STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2014
v	No. 313105 Kent Circuit Court
CLIFTON TROY RHODES, III, Defendant-Appellant.	LC No. 12-001524-FH

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of failure to comply with the Sex Offenders Registration Act (SORA), MCL 28.729. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to two to four years and two to eight years, respectively. We affirm defendant's convictions, but remand for resentencing.

I. FACTUAL BACKGROUND

In 2000, defendant was convicted of attempted fourth-degree criminal sexual conduct. Thereafter, he was registered as a sex offender. The records clerk at the City of Grandville testified that pursuant to statutory amendments in 2011, defendant was required to report semi-annually in order to verify, *inter alia*, his address and phone number. While defendant was required to report in 2012 between January 1 and 15, he failed to appear.

The records clerk notified a detective sergeant on January 16th that defendant had failed to report. The detective called the phone number defendant had listed in the registry, but no one responded. She left a message, informing defendant that he was noncompliant and he needed to come in "ASAP."

Defendant did not arrive until January 18th. When the detective asked him what number he had listed on the SORA registry, defendant replied that he did not know and it might be his mother's. During their conversation, defendant received a call on his cellular phone. The cellular phone number was different from defendant's listed number. When the detective asked him how long he had that cellular phone, defendant replied "a few years." A corrections officer for the Kent County Sheriff's Department testified that in 2007 and 2012, this cellular number was listed as defendant's telephone number.

At trial, defendant admitted to failing to report within the required time frame, but claimed the he had some "medical issues" that prevented him from doing so. He acknowledged receiving the January 16th message to come in "ASAP," but stated that he worked on January 17th. He believed he complied with the "ASAP" instruction when arriving on the 18th. As to the different telephone numbers, defendant asserted that the number listed in the registry belonged to him, and the cellular phone number was his father's. He denied telling the detective otherwise.

The jury found defendant guilty of two counts of failure to comply with SORA. Defendant now appeals on several grounds.

II. EQUAL PROTECTION

A. STANDARD OF REVIEW

Defendant first contends that he was denied the equal protection of law because charges were not brought against a white man who committed the same crime as defendant. "We review a prosecutor's charging determination under an abuse of power standard to determine if the prosecutor acted contrarily to the Constitution or law." *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005) (quotations marks omitted).[1]

Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "Because no [hearing] occurred, our review of defendant's claim of ineffective assistance of counsel is limited to errors apparent on the record." *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

B. DISMISSAL

"The authority to prosecute for violation of offenses against the state is vested solely and exclusively with the prosecuting attorney." *People v Jones*, 252 Mich App 1, 6; 650 NW2d 717 (2002) (quotation marks, brackets, and citation omitted). Thus, "the trial court's authority over the discharge of the prosecutor's duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires." *Id.* (quotations marks and citation omitted). In other words, the prosecution "is a constitutional officer with discretion to decide whether to initiate charges and what charges to bring" and this "discretion over what charges to file will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification." *In re Hawley*, 238 Mich App 509, 512; 606 NW2d 50 (1999).

[1] While the trial court found that defendant did not timely raise this challenge in a written motion to dismiss, the court also ruled on the issue, so it was raised, addressed, and decided below. *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007).

In the instant case, defendant asserts that the prosecution acted in contravention of the equal protection clause when it charged defendant, but not a similarly situated white man. To establish an equal protection violation in the context of charging, a defendant must prove "two-prong test of intentional and purposeful discrimination." *People v Ford*, 417 Mich 66, 102; 331 NW2d 878 (1982); see also *In re Hawley*, 238 Mich at 513. First, the defendant must show that he was " 'singled' out for prosecution while others similarly situated were not prosecuted for the same conduct." *Ford*, 417 Mich at 102. Second, the defendant must show that "this discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion or the exercise of a fundamental right." *Id.*

Defendant has not established selective prosecution. First, the record does not reveal whether the other individual was prosecuted. The record also failed to show whether the other person was Caucasian. Moreover, assuming *arguendo* that the individual was not prosecuted, defendant has failed to establish that any selectivity in enforcement was based on race. Both defendant and the other individual were allegedly notified on January 16, 2012, that they were not in compliance with SORA and that they needed to report "ASAP." While this other individual came in that same day, defendant chose to wait an additional two days before reporting. The detective testified that had defendant reported immediately after receiving her telephone call, she probably would not have reported him.

Thus, to the extent that selectivity in enforcement could even be proved, the record does not support it was based on race. The trial court correctly rejected defendant's equal protection argument, and defendant was not entitled to dismissal of the charges based on this ground.[2]

We likewise reject defendant's claim that his trial counsel was ineffective for failing to timely file the motion to dismiss on this ground. Defense counsel is not ineffective for failing to advance a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

C. PLEA NEGOTIATIONS

Defendant also contends that had he known his counsel would fail to timely assert the equal protection argument in a motion to dismiss, he would have accepted the plea offer. Because this alleged error is not apparent from the record, it is not subject to our review. *Horn*, 279 Mich App at 38. Moreover, "[i]n the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *People v Douglas*, 296 Mich App 186, 206; 817 NW2d 640 (2012) (quotation marks and citation omitted).

While defendant asserts that he would have accepted the plea deal but for counsel's advice, the record does not support this claim. The plea offer was placed on the record on February 13, 2012, and defendant formally rejected the offer on June 4th, a mere two days before

[2] Nor was defendant denied the constitutional right to present a defense, as that right will "bow to accommodate other legitimate interests in the criminal trial process" such as the rules of evidence. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008) (quotation marks and citation omitted); see also MRE 402 ("Evidence which is not relevant is not admissible.").

trial. Even assuming defendant somehow still believed his case would be dismissed or that the jury would be informed about the other individual, that possibility was foreclosed on the first day of trial when the court granted the prosecution's motion in limine to exclude any mention of the other individual, and rejected defense counsel's equal protection argument. Importantly, after that ruling, the prosecution again offered defendant the plea. While the trial court warned defendant of the harsher penalty if convicted at trial, defendant again rejected the plea, and indicated that he wished to go to trial. Thus, the record establishes that defendant rejected the plea offer knowing the equal protection argument was foreclosed.

Therefore, defendant's claim of ineffective assistance of counsel fails. "We have previously denied defendant's request for a remand, and we decline to reconsider defendant's request." *Horn*, 279 Mich App at 38 (citation omitted).

III. SUPERSEDING CAUSE

A. STANDARD OF REVIEW

Defendant next argues that because of a superseding cause, he was not liable for failing to timely report, and his trial counsel was ineffective for failing to assert that argument below. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Our review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. *Horn*, 279 Mich App at 38.

B. ANALYSIS

Defendant's argument is meritless for many reasons. First, MCL 28.725a(3)(b) provides that a tier II sex offender "*shall* report twice each year" pursuant to the detailed schedule. (Emphasis added). The word "shall" denotes a mandatory action, *People v Pennebaker*, 298 Mich App 1, 6; 825 NW2d 637 (2012), and there is no applicable exception apparent in this section. Defendant was in violation of the statute when he did not report by January 15th. The fact that the detective told him, on January 16th, to come in "ASAP" in no way diminishes defendant's guilt, as he had already violated the statute by the time the detective called him.

Accordingly, defendant's related argument that his counsel was ineffective for failing to raise this issue is meritless. Counsel is not ineffective for failing to advance a meritless position. *Snider*, 239 Mich App at 425.

IV. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

Defendant also contends that the trial court erred in admitting evidence of his Kent County jail records from 2007 and 2012 containing his biographical information, including his cellular phone number. Generally, we review a trial court's decision whether to admit evidence for an abuse of discretion and review preliminary questions of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, "a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). To the extent that defendant's argument

implicates MRE 403, which he did not specifically and timely raise below, our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 764-765.

Defendant likewise argues that his counsel was ineffective for not stipulating to such evidence. Our review is limited to errors apparent on the record. *Horn*, 279 Mich App at 38.

B. ANALYSIS

Defendant concedes that the records were relevant to the issue of whether he had been using that cellular phone number, but argues that they were unfairly prejudicial. Pursuant to MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005) (quotation marks and citation omitted).

Here, defendant's jail records were highly relevant because they revealed that although he had been using this cellular phone number for many years, he failed to disclose that for the SORA registry. The challenged records made it more probable that defendant willfully failed to disclose a telephone number either registered to or routinely used by him. MCL 28.727(1)(h). Further, there is no indication that this evidence injected considerations extraneous to the merits of the lawsuit. *McGhee*, 268 Mich App at 614. The jury was never apprised of the reason for defendant's incarcerations, and the trial court instructed the jury not to speculate on the reason defendant was placed on the sex offense registry. Thus, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and the trial court did not err in admitting the evidence.

Defendant alternatively contends that defense counsel was ineffective for failing to stipulate that defendant had previously given authorities this phone number. Even assuming that defense counsel did not investigate that avenue, nothing on the record suggests that the prosecution would have been amenable to such an agreement. See *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) ("There is no rule requiring the prosecution to use only the least prejudicial evidence per se to establish facts at issue. . . . [T]he decision whether to admit this evidence would remain within the discretion of the trial court.).

Moreover, defendant cannot establish the result of the trial would have been different but for counsel's alleged error. Regardless of the jail records, the detective involved with the SORA registry testified that when defendant finally appeared, he had the cellular phone on his person, he disclosed the number that was inconsistent with the SORA registry, and he admitted to having

this phone for a "few years." In light of the foregoing, it cannot be said that the results of the proceedings would have been different but for any alleged error of defense counsel's.[3]

Defendant has not established that he was denied the effective assistance of counsel.

V. JUDICIAL BIAS

A. STANDARD OF REVIEW

Defendant next argues that he was denied his due process right to a fair trial because of judicial bias. We review this unpreserved issue for plain error affecting substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011).

B. ANALYSIS

"A defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality." *Id.* at 598 (quotation marks and citation omitted). A trial court has wide discretion when conducting matters of trial conduct, and is constrained only in that it must not pierce the veil of judicial impartiality. *Id.* "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Id.* (quotation marks and citation omitted).

Defendant contends that the trial court criticized or otherwise chastised defense counsel throughout the trial, which deprived him of a fair trial. Yet, defendant concedes that the majority of these allegedly negative comments occurred outside the presence of the jury.[4] Furthermore, "[c]omments that are critical of or hostile to counsel and the parties are generally not sufficient to pierce the veil of impartiality." *Jackson*, 292 Mich App at 598. Defendant has failed to demonstrate that any such comments pierced the veil of judicial impartiality or unduly influenced the jury.

While defendant also suggests that the trial court's bias denied him the effective assistance of counsel, he has not expounded on this argument nor supported it sufficiently. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (quotation marks and

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[3] This same analysis applies to defendant's unpreserved challenge based on MRE 404(b). He has not demonstrated that any error affected the outcome of the proceedings. *Carines*, 460 Mich at 763.

[4] While defendant highlights the trial court's decision to place him and defense counsel in a holding cell when defense counsel and defendant became overwrought and refused to listen to the trial court's instructions, that incident occurred outside the presence of the jury. As stated *supra*, the test for judicial bias is whether the court's conduct pierced the veil of judicial impartially through "unduly influenc[ing] the jury." *Jackson*, 292 Mich App at 598 (quotation marks and citation omitted). Defendant has failed to explain how any of the court's conduct, occurring outside the jury's presence, unduly influenced the jury.

citation omitted) ("Failure to brief a question on appeal is tantamount to abandoning it."). Our review of the record reveals that defense counsel conducted a thorough examination of the witnesses and vigorously contested defendant's guilt. Defendant's claims of judicial bias are meritless.

VI. SENTENCING

A. STANDARD OF REVIEW

Lastly, defendant contends that he was denied his due process right to be sentenced on accurate information when the trial court denied his request for a hearing regarding additions to the presentence investigation report (PSIR). We review for an abuse of discretion a claim of inaccuracies in the PSIR. *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009). An abuse of discretion occurs when the court selects an outcome outside the range of reasonable and principled outcomes. *Id.* We review questions of law de novo. *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

B. ANALYSIS

On the day of sentencing, the trial court incorporated an addendum into the PSIR pertaining to defendant's conduct while incarcerated. This addendum was not made available to defense counsel until a couple of hours before sentencing. Pursuant to MCR 6.425(B), if the PSIR is not made available to defendant's lawyer "at least two business days before the day of sentencing, . . . the defendant's lawyer . . . shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the moving party to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court." The word "shall" denotes mandatory conduct. *People v Bell*, 276 Mich App 342, 347; 741 NW2d 57 (2007).

Here, defense counsel requested additional time to review and properly respond to the addendum, but the trial court refused. This contravenes the plain language of MCR 6.425(B). Furthermore, we cannot consider this error harmless, as the trial court indicated that it was "certainly" going to consider the information in the addendum when imposing the sentence.

Thus, we agree with defendant that the court erred in denying his request for additional time to review the addendum in order to challenge its accuracy.

VII. CONCLUSION

Defendant has not established an equal protection violation or that he was denied the effective assistance of counsel. He likewise has failed to demonstrate a superseding cause, evidentiary error, or judicial bias that relieves him of liability. However, we agree that the court erred in failing to grant defendant additional time in which to review and challenge the addendum to the PSIR.

We affirm defendant's convictions but remand for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael J. Riordan